(15)

No. 93-6497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FRANK BASIL MCFARLAND,

Petitioner,

vs.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTION PRESENTED

Does a federal district court have the jurisdiction to stay the execution of a state death penalty judgment prior to the filing of a habeas corpus petition?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves efforts to add to the already excessive delay in our capital punishment system by illegally extending the power of the federal courts to stay state judgments. Such illegal delay is contrary to the interests of victims and society that CJLF was formed to protect.

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1. Both parties have consented to the filing of this brief.

SUMMARY OF FACTS AND CASE

Petitioner was convicted of murdering Terry Hokason in the course of committing an aggravated sexual assault and sentenced to death. See *McFarland* v. *State*, 845 S. W. 2d 824, 828-829 (Tex. Crim. App. 1992); Tex. Penal Code Ann. § 19.03(a)(2) (Vernon Supp. 1991). On September 23, 1992, the Texas Court of Criminal Appeals affirmed his conviction and sentence. *McFarland*, *supra*, 845 S. W. 2d, at 828.

On December 9, 1992, the Texas court denied rehearing. Opp. 3. On December 12, the same court stayed McFarland's execution to allow him time to file a certiorari petition. *Id.*, at 4.

On March 9, 1993, McFarland filed a certiorari petition, which this Court denied on June 7, 1993. *McFarland* v. *Texas*, 124 L. Ed. 2d 686, 113 S. Ct. 2937 (1993). On August 16, 1993, an execution date was set for September 23, 1993, exactly one year after McFarland's conviction was affirmed by the Texas Court of Criminal Appeals. Opp. 4. This date was later moved back to October 27, 1993. *Id.*, at 5.

On October 22, 1993, McFarland, with the help of the Resource Center, filed *pro se* a Motion for Stay of Execution and for Appointment of Counsel in the District Court. This was filed without an accompanying habeas corpus petition. *Ibid*. On October 25, 1993, the District Court denied the stay and refused to grant a certificate for probable cause to appeal ("CPC") because the action was not a habeas proceeding. *Ibid*. On the same day, the Fifth Circuit denied CPC and a stay. *McFarland* v. *Collins*, 7 F. 3d 47, 49 (1993) (*per curiam*).

SUMMARY OF ARGUMENT

The Anti-Injunction Act is a strict prohibition of federal interference with state court proceedings, subject only to a few narrowly construed exceptions. No exception other than 28 U. S. C. § 2251 applies to habeas corpus.

A case is not "pending" within the meaning of section 2251 until a petition is filed. A document which does not meet the minimal showing required by statute and rule cannot be "deemed" to be a petition.

Although not essential to a jurisdictional analysis, it is worth noting that practical alternatives to prefiling stays exist. Potential petitioners can apply for counsel immediately upon exhaustion of state remedies. Prompt application will provide counsel sufficient time to place all exhausted claims in petition form and obtain a stay. Omitted claims can be added by amendment.

This alternative advances the crucial state interest in avoiding unnecessary delay in the imposition of death sentences. Petitioner's proposal, if accepted, will only add to the needless delay that already plagues our capital punishment system.

ARGUMENT

I. Section 2251 is the sole authority for staying an execution.

Amicus has previously briefed to this Court our position that the Anti-Injunction Act[2] strictly limits the power of federal courts to stay state executions. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* supporting certiorari in *Vasquez* v. *Brown*, No. 91-1425, cert. denied, 118 L. Ed. 2d 435, 112 S. Ct. 1778 (1992) and *Vasquez* v. *Thompson*, No. 91-1930, cert. denied, 121 L. Ed. 2d 564, 113 S. Ct. 633 (1992). *Amicus* argued that

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2. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgements." 28 U. S. C. § 2283.

the Anti-Injunction Act is an absolute prohibition against staying state cases, not a discretionary admonition. The prohibition is construed broadly, with only narrowly construed exceptions that do not apply to stays of execution granted before a habeas corpus petition is filed. See *Brown* Brief 3-7, *Thompson* Brief 3-7. As the Attorney General will present this argument to the Court in the present case, *amicus* will refrain from extensive briefing on the issue, and instead refers this Court to its briefs in *Brown* and *Thompson*.

Amicus will instead address petitioner's attempts to avoid the clear prohibition of the Anti-Injunction Act through the All Writs Act, 28 U. S. C. § 1651(a), and 21 U. S. C. § 848(q)(4)(B). As will be shown, neither alternative is successful. The All Writs Act cannot be used to create federal jurisdiction where none already exists, while section 848(q)(4)(B) is simply irrelevant to the issue of staying state court actions.

A. The All Writs Act.

1. Dean Foods.

Petitioner asserts that the District Court could have issued a stay under the All Writs Act, 28 U. S. C. § 1651(a) and *FTC* v. *Dean Foods Co.*, 384 U. S. 597 (1966). *Dean Foods* is distinguishable on several grounds.

First and foremost, *Dean Foods* did not involve any prohibition on injunctive relief. It was a pure case of searching for authority in the absence of any clear indication from Congress one way or the other. See *id.*, at 608. The difference between that type of case and one involving a prohibition on injunctions is critical. See, *e.g.*, *Camping Construction Co.* v. *District Council of Iron Workers*, 915 F. 2d 1333, 1347 (CA9 1990).

A related distinction, and one nearly as important, is that *Dean Foods* does not involve the delicate relationship between state and federal courts. Federal injunction of state

proceedings is a grave step, never to be taken lightly. See, *e.g.*, *Younger* v. *Harris*, 401 U. S. 37, 41, 43 (1971).

Finally, *Dean Foods* involved a writ issued by an appellate court in a case which had already entered the federal adjudicatory process. The Federal Trade Commission had filed a complaint and was reviewing a merger. 384 U. S., at 599. The FTC decision would eventually be reviewed by the Court of Appeals. *Id.*, at 604. The FTC, however, did not have authority to enjoin the merger. See *id.*, at 609-610. The Court of Appeals had authority to preserve the status quo under the All Writs Act, even though the proceeding was still pending before the FTC. *Dean Foods* cited as authority cases in which appellate courts had issued orders in cases pending in the lower courts, which would later be appealed. *Id.*, at 603.

The other cases cited by petitioner in support of his *Dean Foods* argument, see Brief for Petitioner 37, n. 24, are equally distinguishable. None of them involved stays of state court actions. Instead, as in *Dean Foods*, they involved writs issued by federal appellate courts in cases that had already entered the federal judicial system. See *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 22-24 (1943); *McClellan* v. *Carland*, 217 U. S. 268, 274-277 (1910); *Clark* v. *Busey*, 959 F. 2d 808, 810-811 (CA9 1992); *ITT Community Develop. Corp.* v. *Barton*, 569 F. 2d 1351, 1352-1353 (CA5 1978); *Republican State Central Committee of Arizona* v. *Ripon Society*, 409 U. S. 1222, 1222-1223 (1972) (Rehnquist, J., in chambers). These cases are a far cry from petitioner's efforts to create federal jurisdiction over state cases that are not yet in the federal system.

The principal case relied on by *Dean Foods* is *Whitney Nat. Bank* v. *Bank of New Orleans & Trust Co.*, 379 U. S. 411 (1965). See *Dean Foods*, 384 U. S., at 604. *Whitney* is a ringing affirmation of the legitimacy and wisdom of Congress's choice to substitute an administrative body in the place of the District Court in certain specialized areas. *Whitney*, 379 U. S., at 420-421. *Dean Foods*, 384 U. S.,

at 604, also relies on *Continental Illinois National Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648 (1935). That case, in turn, relies on *Kline* v. *Burke Construction Co.*, 260 U. S. 226 (1922) for the proposition that "a federal court, *having first acquired jurisdiction* of the subject matter, could enjoin the parties . . . ." 294 U. S., at 675 (emphasis added). When a *state* court has *first* acquired jurisdiction, *Dean Foods* provides no authority to enjoin it. Petitioner's interpretation of *Dean Foods* would effectively repeal the Anti-Injunction Act.

2. *Supreme Court stays.*

It is true that this Court and its Justices can and do issue stays of state court proceedings in cases where the certiorari petition has not yet been filed. See, *e.g.*, *California* v. *Velasquez*, 445 U. S. 1301 (1980) (Rehnquist, J., in chambers). Far from supporting petitioner's case, this power and its source refute it.

This Court is unique among federal courts. It alone has appellate jurisdiction over cases arising in the state courts. 28 U. S. C. § 1257. This unique jurisdiction calls for a unique power regarding stays, see *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U. S. 281, 296 (1970), and Congress has provided one in 28 U. S. C. § 2101(f):

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court . . . ."

The contrast between the wording of this statute and the wording of section 2251 is striking and significant. The Supreme Court may grant stays in cases merely "subject to review," but the District Court on habeas corpus is limited

to granting stays when a "proceeding is pending" before that court. Both provisions were adopted in the same act: the 1948 revision of Title 28. See Pub. L. No. 80-773, 62 Stat. 961-962, 966-967 (1948).

Congress knows how to unambiguously authorize prefiling stays when it deems them necessary. The staying of a state court action which has not yet entered the federal system is a grave step. Congress has seen fit to allocate such power to this Court alone.

McFarland asserts that this Court considers the All Writs Act to be the primary source of its stay authority, but his authority for this proposition is weak. *Lenhard* v. *Wolff*, 443 U. S. 1306 (1979) (Rehnquist, J., in chambers) is just a single passing statement by a single Justice in a case where jurisdiction was not genuinely at issue. His other sources, *Woodard* v. *Hutchins*, 464 U. S. 377 (1984) (*per curiam*) and *Land* v. *Florida*, 377 U. S. 959 (1964) are similarly unpersuasive.

In *Woodard*, the federal courts already had jurisdiction over the case; the second habeas corpus petition was still pending in the District Court even though the lower court had vacated the stay of execution. See *id.*, at 377-378. As the habeas action was still pending in the District Court, there was no "final judgment or decree" reviewable by this Court on writ of certiorari. 28 U. S. C. § 2101(f). Therefore, the All Writs Act was necessary to preserve a case that was already before the federal courts. This is far removed from petitioner's attempt to invoke the statute to allow a federal court to acquire jurisdiction over a state action where none had previously existed.

In *Land*, this Court did deny a certiorari petition while simultaneously staying the execution to allow Land 60 days to file a habeas corpus petition in District Court. 377 U. S., at 959. A key distinction between *Land* and the present case is that Land's case had formally entered the federal court system through a certiorari petition when this Court extended the stay. When this Court denies certiorari, its jurisdiction

over a case does not end. It may decide to grant certiorari after a motion for rehearing, see Supreme Court Rule 44.2, and this Court may even reopen a case on an out-of-time petition for rehearing filed well after the initial petitions for certiorari and rehearing were denied. See *Gondeck* v. *Pan American World Airways, Inc.*, 382 U. S. 25, 26-27 (1965) (*per curiam*); see also *United States* v. *Ohio Power Co.*, 353 U. S. 98, 99 (1957). *Land*, while cryptic as to the source of its jurisdiction, is best explained as an example of this Court's continuing certiorari jurisdiction.

There is much stronger authority against petitioner's assertion. First, there is the preeminent treatise in the field. R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice § 17.11, at 675 (6th ed. 1986) cites section 2101(f) as the authority for this Court to stay cases subject to certiorari review and mentions no others. Then, there is *New York Times Co.* v. *Jascalevich*, 439 U. S. 1317 (1978), in which Justice White, in chambers, recognized that section 2101(f) was the source of authority for a stay of a state court action. *Id.*, at 1318. Because that section applies only to final judgments, a long finality analysis was necessary. *Id.*, at 1318-1322. Justice Marshall followed the same path on a successive application three days later. *New York Times Co.* v. *Jascalevich*, 439 U. S. 1331, 1332-1334 (1978). If *Dean Foods*, in which Justice White participated and which Justice Marshall personally argued as Solicitor General, provided the authority to grant a stay without the finality requirement, it seems very strange that both Justices were so concerned with finality.

Supreme Court practice thus provides no authority for a comparable power in the District Court. This Court's stay power derives from a special statute. Congress has conferred a unique power on this Court in order to discharge its unique responsibilities. Congress has also conferred a stay power on the federal habeas court, but that power is worded differently. The difference is intentional.

B. The Anti-Drug Abuse Act of 1988.

Petitioner and supporting *amici* assert that Title 7, section 7001 of the Anti-Drug Abuse Act of 1988, 21 U. S. C. § 848(q)(4)(B) (Pub. L. No. 100-690, 102 Stat. 4181, 4193 (1988)), provides federal district courts with the authority to stay state executions before a habeas corpus petition has been filed. First, they argue that the provision for counsel under section 848(q)(4)(B) creates a right to counsel that can be protected only by interpreting the All Writs Act and section 2251 to allow federal district courts to issue prefiling stays of execution. See Brief for Petitioner 32-36, 39; Brief for American Civil Liberties Union ("ACLU Brief") as *Amicus Curiae* 10-14; Brief for American Bar Association ("ABA Brief") as *Amicus Curiae* 28-29. Second, petitioner also asserts that section 848(q)(4)(B) creates an independent exception to the Anti-Injunction Act. Brief for Petitioner 45-47.

Neither contention is sound. Both ignore the unavoidable fact that section 848(q)(4)(B) does not address the subject of stays. It is too far a stretch to imply jurisdiction for federal courts to stay executions from the straightforward language of section 848(q)(4)(B).

1. Statutory interpretation.

Petitioner argues that his request for appointed counsel and a stay of execution creates a pending habeas corpus action that triggers the jurisdiction to grant stays under section 2251. Brief for Petitioner 32-36. This is contrary to the common understanding of what constitutes a pending action. See *post*, at 13-18. Section 848(q)(4)(B) cannot be used to overcome this common sense interpretation.

McFarland notes that he is entitled to counsel under section 848(q)(4)(B) before a habeas petition is filed. Brief for Petitioner 21-29. He also notes that section 848(q)(4)(B) allows for the appointment of counsel "during the pendency of any 'post conviction proceeding' . . . ." *Id.*, at 33, quoting 21 U. S. C. § 848(q)(4)(B). Section 2251, in very

similar language, authorizes district courts "to enter a stay during any 'habeas corpus proceeding.' " *Ibid.*, quoting 28 U. S. C. § 2251. From this he reasons that a "habeas corpus proceeding" triggering authority to grant a stay under section 2251, like a "post-conviction proceeding" under section 848(q)(4)(B), can occur before a habeas petition is filed. *Id.*, at 33-36.

This definition of habeas "proceeding" is contrary to the definition given by Congress. Although "proceeding" is not formally defined by statute, section 2254(d) states "[i]n any proceeding *instituted* in a Federal court *by an application* for a writ of habeas corpus . . . ." (Emphasis added). To institute means to "begin," American Heritage Dictionary 936 (3d ed. 1992) or "to bring something into existence," *id.*, at 717 (synonym note at "found"). Thus, there is no habeas "proceeding" until the petition (application) is filed, see *post*, at 13-18. Defining "proceeding" by the commencement of the action is consistent with commonly accepted definitions of "proceeding." A proceeding is the "[r]egular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment." Black's Law Dictionary 1204 (6th ed. 1990).

Weighed against this straightforward definition of "habeas corpus proceeding" is petitioner's desire to use section 848(q)(4)(B) to require a different definition of "proceeding" under section 2251 for the purpose of death penalty cases. He raises this construction in spite of the fact that section 848(q)(4)(B) neither addresses the issue of stays nor directly defines "proceeding." Given the straightforward language of section 2251 and section 2254(d), petitioner's interpretation would be an unnecessary implied amendment of these provisions. Implied amendment is disfavored, and will not be found without statutory language showing "a considered determination to that end . . . ." *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 134 (1974). The

appointment of counsel language in section 848(q)(4)(B) shows no such intent.

Section 848(q)(4)(B) did not change the meaning of section 2251. If Congress has authorized district courts to issue prefiling stays it would have said so directly; it does not need to use such an obscure and remote source as section 848(q)(4)(B). If a district court has any authority to issue prefiling stays, it must be found within the plain text of section 2251. As explained below, section 2251 does not provide the federal courts with the authority that petitioner desires. See *post*, at 13-18.

2. No independent authority.

Petitioner's attempt to use section 848(q)(4)(B) to carve out a new exception to the Anti-Injunction Act, 28 U. S. C. § 2283, fares no better than his attempt to reinterpret section 2251. He argues that section 848(q)(4)(B) "has 'created a specific and uniquely federal right or remedy' that not only 'could be frustrated,' but would be utterly defeated 'if the federal courts were not empowered to enjoin a state court proceeding.' " Brief for Petitioner 46, quoting *Mitchum* v. *Foster*, 407 U. S. 225, 237 (1972). This founders on the fact that section 848(q)(4)(B) does not provide federal courts with any equitable power.

The issue in *Mitchum* was whether the injunctive provisions of 42 U. S. C. § 1983 were exempt from the Anti-Injunction Act. See *id.*, at 226. In concluding that section 1983 was exempt, the *Mitchum* Court held that the key to exemption "is whether an Act of Congress, clearly creating a federal right or remedy *enforceable in a federal court of equity*, could be given its intended scope only by the stay of a state court proceeding." *Id.*, at 238 (emphasis added). Because section 848(q)(4)(B) contains no equitable authorization it is not exempt from the Anti-Injunction Act.

Central to the *Mitchum* Court's decision to exempt section 1983 was the fact that "Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by

expressly authorizing a 'suit in equity' as one of the means of redress." *Id.*, at 242 (emphasis added). Section 848(q)(4)(B) contains no authorization for any federal court to entertain any suits in equity.

The *Mitchum* Court noted that in addition to the bankruptcy law there were six other exceptions to the Anti-Injunction Act that had been recognized by the Court. See *id.*, at 234, 235, nn. 12-17. Three of the exceptions specifically authorized federal courts to stay state proceedings. See *ibid.*, nn. 14-16. The other three gave federal courts broad powers to stop other proceedings or claims. See *ibid.*, nn. 12, 13, 17. No such authority has been granted under section 848(q)(4)(B). It is no more than a simple appointment of counsel statute.

For the same reason, petitioner cannot invoke section 848(q)(4)(B) as a separate source of authority for relief under the All Writs Act. Power under the All Writs Act presumes that there is some action over which the federal courts have acquired subject matter jurisdiction. See *Continental Illinois National Bank* v. *Chicago, R. I. & P. R. Co.*, 294 U. S. 648, 675 (1935). Section 848(q)(4)(B) creates no cause of action and thus provides no jurisdiction that would allow a federal court to invoke the All Writs Act.[3]

Amicus agrees with petitioner that section 848(q)(4)(B) does allow for prefiling appointment of counsel. It refers to appointment for "defendants," not petitioners, and it provides the counsel appointed for "defendants" with broad authority to represent the client. Paragraph (4)(B) explicitly incorporates paragraph (8), which clearly contemplates interstitial representation. Contrary to the claims of petitioner, it makes perfect sense to refuse to read the power to grant prefiling stays into section 848(q)(4)(B). See Brief for Petitioner 34. It is entirely logical that there is a looser requirement for appointment of counsel than for a stay. In fact for the reasons discussed in part IV, *post*, it is the practical solution to the present dilemma.

3. Petitioner's attempt to use section 848(q)(4)(B) to invoke the All Writs Act to protect the prospective jurisdiction of a federal court, see Brief for Petitioner 39, is just a rehash of his *Dean Foods* argument and warrants dismissal for the reasons discussed earlier. See *ante*, at 4-6.

The intent of Congress is not only conceivable, it is vividly evident. The plain words of the Anti-Injunction Act and the two-century history of its strict enforcement by this Court display a powerful policy against interference with state proceedings when it is not absolutely necessary. See *Younger* v. *Harris*, 401 U. S. 37, 41 (1971). There is no comparable policy against appointment of counsel which, by itself, has no impact on federalism or comity at all. The sole direct impact of appointment is on the federal treasury.

In summary, none of petitioner's asserted bases of jurisdiction provides an exception to the Anti-Injunction Act. If authority for this stay exists at all, it can be found only under section 2251.

II. A proceeding is "pending" under section 2251 when the petition is filed and not before.

The crux of this case is when a habeas corpus proceeding is "pending." Authority on the question is sparse, simply because relatively few litigants have dared to ask a court for relief before they have filed a complaint.[4] What little authority exists, however, is almost uniformly against petitioner's position. The only authority supporting McFarland's contention, *Brown* v. *Vasquez*, 952 F. 2d 1164 (CA9

4. Before *Brown* v. *Vasquez*, 952 F. 2d 1164 (CA9 1991) even the most partisan of the pro-petitioner commentators had stated that the petition was a prerequisite to federal jurisdiction. 1 J. Liebman, Federal Habeas Corpus Practice and Procedure ¶ 11.1, at 145 (1988).

1991), is a policy statement, not a rule of law. See *post*, at 18.

In re Connaway, 178 U. S. 421 (1900) appears to be the only direct authority for when an action begins so as to make it "pending." Connaway filed a complaint in the Circuit Court for the Ninth Circuit against Overton, but he was unable to serve it before Overton died. He then obtained a writ of *scire facias* to substitute the executor of Overton's estate as a party. *Id.*, at 423. A federal statute authorized the issuance of the writ "from the office of the clerk of the court where the suit is *pending*." *Id.*, at 425 (emphasis added).

The circuit court granted the executor's motion to set aside the *scire facias* on the ground that no suit had been pending at the time of Overton's death because he had not been served. *Connaway* applied to the Supreme Court for a writ of mandamus.

> "When can a suit be said to be 'in any court of the United States,' or said to be 'pending' therein? Is not the answer inevitable, from the time the suit is commenced? *It cannot be pending until it is commenced*, and if it continue until the death of the 'plaintiff or petitioner or defendant,' the requirements of the section seem to be satisfied.
>
> "Another inquiry becomes necessary — when is a suit commenced? For an answer we must go to the California statutes.[5] By section 405 of the Code of Civil Procedure, it is provided: 'Civil actions in the courts of this State are commenced by filing a complaint.' By section 406 summons may be issued at any time within a year, and if necessary to different counties. The defendant may appear, however, at any time within a year. *The filing of the complaint, therefore, is the commencement of the action and the jurisdiction of the court over the case.*" *Id.*, at 427-428 (emphasis added).

5. At this time federal courts adopted the procedural statutes of the states in which they sat, absent an applicable federal statute. See 2 J. Moore & J. Lucas, Moore's Federal Practice ¶ 1.02[1], at 1-5 (2d ed. 1990).

Connaway thus squarely holds that in a court governed by a commencement rule equivalent to former section 405 of the California Code of Civil Procedure, a suit is not in the court and is not "pending" until the complaint is filed. Rule 3 of the Federal Rules of Civil Procedure ("FRCP") is indistinguishable from the statute construed in *Connaway*: "A civil action is commenced by filing a complaint with the court."

This is consistent with the commonly accepted legal definition of "pending": "*Begun*, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment . . . . Thus, an action or suit is 'pending' from its inception until the rendition of final judgment." Black's Law Dictionary 1134 (6th ed. 1990) (emphasis added).

The federal authority regarding injunctions in civil matters is consistent with the view that a habeas proceeding is not pending until a petition is filed. The federal law on preliminary injunctions, FRCP 65, contains no independent grant of authority for the use of federal power. See *Citizens Concerned for Separation of Church and State v. City and County of Denver*, 628 F. 2d 1289, 1299 (CA10 1980) (Rule 65 "has no relationship to or bearing on either the jurisdiction to exercise or the propriety of exercising the injunctive power.") "In keeping with its procedural function, Rule 65 does not confer either subject matter or personal jurisdiction on the court. As is true of civil actions generally, an independent basis for asserting federal question or diversity jurisdiction must be shown . . . ." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2941, at 362-363 (1973) (citations omitted). Rule 65 merely provides the procedure to be used for the issuance of injunctions in the

"civil action" governed by the Federal Rules. FRCP 2 states: "There shall be one form of action to be known as 'civil action.' " FRCP 3 states: "A civil action is commenced by filing a complaint with the court."

The "complaint" in habeas corpus is the petition. Compare 28 U. S. C. § 2254 Rule 2(c) ("Habeas Rules") ("specify all the grounds of relief . . . .") with FRCP 8(a)(2) ("a short and plain statement of the claim . . . ."). As Habeas Rule 4 recognizes, there may not be any substantial federal question. Each of the petitioner's claims may be either (1) not truly federal, see *Engle* v. *Isaac*, 456 U. S. 107, 119 (1982); (2) precluded by state court fact-finding, see *Lewis* v. *Jeffers*, 497 U. S. 764, 780 (1990); (3) proposals for "new rules" precluded by *Teague* v. *Lane*, 489 U. S. 288 (1989); or (4) simply insubstantial.

The requirement that an action be pending is clearly implicit in subdivision (d) of Rule 65. "Every order granting an injunction . . . is binding only upon the parties to the action . . . " and persons in privity with parties. If there is no action there can be no parties, and no one is bound by the injunction.

"Where such party [to be enjoined] is a defendant, jurisdiction over the defendant implies either voluntary appearance by him or effective service of process." 7 Moore, *supra*, ¶ 65.03[3], at 65-27 and 65-28. The process to be served is the summons and complaint together in a regular civil action, FRCP 4(d), and it is the petition in a habeas case, Habeas Rule 4. Without service there is no jurisdiction, and again the person sought to be enjoined is not legally bound.

At the time the stay of execution was requested in the present case, Director Collins was not a "part[y] to the action." FRCP 65. He had not been served with a habeas corpus petition or any other process which would make him a party to the action. No one had been made a party respondent or defendant at that time, because no action had commenced.

Brown v. *Vasquez*, 952 F. 2d 1164 (CA9 1991) ignored these authorities. The *Brown* Court felt that the "underlying purpose of the writ of habeas corpus requires us to view the application for appointment of counsel as triggering the pendency of a habeas proceeding." *Id.*, at 1169. The Ninth Circuit relied on aphorisms to support this conclusion. It noted this Court's dictum that " '[t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.' " *Id.*, at 1166, quoting *Harris* v. *Nelson*, 394 U. S. 286, 290-291 (1969); but see *Brecht* v. *Abrahamson*, 123 L. Ed. 2d 353, 370, 113 S. Ct. 1710, 1719 (1993) ("Direct review is the principal avenue for challenging a conviction." Federal habeas corpus "is secondary and limited."). In addition to this statement, the Ninth Circuit justified its result by noting that habeas corpus should be administered with " 'initiative and flexibility,' " 952 F. 2d, at 1166, quoting *Harris*, *supra*, 394 U. S., at 291, and that it must reject interpretations of the habeas statutes " 'that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements,' " 952 F. 2d, at 1166, quoting *Hensley* v. *Municipal Court*, 411 U. S. 345, 350 (1973).

Finally, the Ninth Circuit noted that this Court's decision to limit successive habeas petitions in *McCleskey* v. *Zant*, 499 U. S. 467 (1991) made it imperative for habeas petitioners to make all their claims in the first petition, making habeas counsel all the more necessary for the death penalty prisoner. See 952 F. 2d, at 1166-1169. In an argument very reminiscent of those given by petitioner and supporting *amici* in the present case, the Ninth Circuit concluded that a prefiling stay was justified in order to allow habeas counsel to be found for the death row prisoner. *Id.*, at 1168-1169.

This decision was motivated entirely by policy considerations, with no pertinent analysis of habeas procedure or the authorities on what constitutes a pending case. It simply chose to ignore the strong analogy from the FRCP, see *id.*,

at 1169, n. 13, in spite of this Court's recognition of the FRCP's importance in determining appropriate habeas procedure. "Where, as here, the need is evident for principles to guide the conduct of habeas proceedings, it is entirely appropriate to 'use . . . [general civil] rules by analogy or otherwise.' " *Hilton* v. *Braunskill*, 481 U. S. 770, 776, n. 5 (1987), quoting *Harris*, *supra*, 394 U. S., at 294. *Brown* gave no reason for its definition of pendency, other than a desire to reach an intended result. The decision was a statement of policy not a rule of law, and should be formally disapproved.

III. The application for stay and counsel cannot be "deemed" to be a petition.

Any notion that a request for stay and counsel can be deemed a habeas petition is simply wrong. *Amicus* has found only one other case supporting such an exercise, and the situation there was quite different. In *Studebaker Corp.* v. *Gittlin*, 360 F. 2d 692 (CA2 1966), Studebaker was served with state court process on March 21. The next day, March 22, it filed in federal court an order to show cause "supported by an extensive affidavit." *Id.*, at 694. The hearing was held March 23, the complaint was filed March 24, and the injunction issued March 25. *Ibid.*

Under these circumstances, where the federal plaintiff needed relief within a few days of learning of the state court action, the court permitted the affidavit to be treated as a complaint. *Ibid.* An affidavit is made under oath, even though a regular civil complaint is not required to be verified. FRCP 11; cf. Habeas Rule 2(c). The court described the affidavit as "extensive," implying that it met the minimal requirement of general federal civil practice to state a "short and plain statement of the claim." FRCP 8(a)(2). Under the facts of the case, *Studebaker* is authority for no more than the proposition that a court may deem an affidavit which contains the information required in a com-

plaint to be a complaint *for the purpose of holding a hearing* on whether to grant an injunction. Whether an injunction can actually issue without an actual complaint is another question. The present case is also distinguishable in that no document coming close to serving the function of a habeas petition had been filed at the time the stay was issued.

A Supreme Court case much closer to the present facts points in the opposite direction. In *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147 (1984), would-be plaintiff Brown claimed discriminatory treatment by her former employer, the Welcome Center. After exhausting administrative remedies with the Equal Employment Opportunity Commission (EEOC), she had 90 days to bring a civil action. *Id.*, at 148. Six weeks later, Brown filed a copy of her EEOC "right-to-sue letter" with the District Court and requested counsel. The magistrate mailed her the required form and questionnaire and reminded her of the deadline. Brown returned the questionnaire on the 96th day after the right-to-sue letter. She filed an "amended complaint" on the 130th day, 40 days past the deadline. *Ibid.*

The District Court held that Brown had forfeited her right to judicial review by failing to file a complaint within the statutory time. Specifically, the court rejected the contention that the copy of the right-to-sue letter could be deemed a complaint. *Id.*, at 148-149. The Court of Appeals reversed on the theory that filing the letter "tolled" the statute. *Id.*, at 149. The Supreme Court reversed. *Ibid.*

First, and most importantly for the present case, this Court approved the District Court's ruling that the EEOC letter could not be deemed a complaint. This Court noted that under FRCP 3 an action is commenced by filing a complaint. The District Court had determined "that the right-to-sue letter did not qualify as a complaint under Rule 8 because there was no statement in the letter of the factual basis for the claim of discrimination, which is required by the Rule." *Id.*, at 149. Upholding this ruling, the high court rejected the Court of Appeals' notion that civil rights

plaintiffs were somehow exempt because of a special solicitude for this class of plaintiffs. *Id.*, at 149-150.

The complaint later filed, this Court went on to explain, could not "relate back" to the date of filing of the EEOC letter because that letter did not meet the very minimal requirements to constitute a complaint.

> "Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' [Citations.] *Because the initial 'pleading' did not contain such notice, it was not an original pleading* that could be rehabilitated by invoking Rule 15(c)." *Id.*, at 150, n. 3 (emphasis added).

Baldwin holds, therefore, that notwithstanding the liberal rules of modern pleading, there are limits beyond which a paper cannot be considered a pleading. A mere application for counsel, or even counsel's statement of "nonfrivolous" issues, is beyond the limit for a habeas corpus petition.

The habeas corpus application or petition is not governed by FRCP 8 but rather by 28 U. S. C. § 2241 and Habeas Rule 2. The Habeas Rules are an act of Congress. Although originally promulgated by this Court, see 425 U. S. 1169, they were amended by Congress and approved as amended. See Pub L. No. 94-426 § 1, 90 Stat. 1334 (1976).

It is true, of course, that a "petition for *habeas corpus* ought not to be scrutinized with technical nicety." *Holiday* v. *Johnston*, 313 U. S. 342, 350 (1941). But we are dealing with essentials here, not niceties. "Liberal as the courts are and should be as to practice in setting out claimed violations of constitutional rights, the applicant must meet the statutory test of alleging facts that entitle him to relief." *Brown* v. *Allen*, 344 U. S. 443, 461 (1953).

Congress has quite deliberately made the initial pleading requirements more strict for habeas petitions than for civil complaints in some respects. Civil complaints are generally signed by the attorney and usually need not be verified. FRCP 11. Habeas petitions must be verified, 28 U. S. C. § 2242, or signed under penalty of perjury, Habeas Rule 2(c). The rule requires the petitioner to personally sign the petition. *Ibid.* The statute permits "next friend" petitioners, but only under very limited circumstances. See *Whitmore* v. *Arkansas*, 495 U. S. 149, 163-164 (1990).

In addition, Habeas Rule 2(c) retains "fact pleading" rather than the FRCP 8 "notice pleading." Advisory Committee Note to Habeas Rule 4; 1 J. Liebman, Federal Habeas Corpus Practice and Procedure § 11.4, at 149 (1988). Even Professor Liebman, who calls this requirement "curious," *ibid.*, and "anomalous," *id.*, at 149, n. 3, grudgingly acknowledges two justifications for it. "First, . . . , habeas corpus is in fact designed to review and draws heavily on the record of prior state proceedings . . . . Second, fact pleading . . . enables courts . . . to separate substantial petitions from insubstantial ones quickly and without need of adversary proceedings." *Ibid.*

The second reason is particularly pertinent here. If the petition fails to state facts which, if true, would entitle the petitioner to relief, there is nothing to consider. See *Hill* v. *Lockhart*, 474 U. S. 52, 60 (1985); *id.*, at 62 (White, J., concurring). If the factual basis of the claim has already been decided in a state proceeding which is binding under 28 U. S. C. § 2254(d), it is error to grant a stay. See *Demosthenes* v. *Baal*, 495 U. S. 731, 737 (1990) (*per curiam*); see also *post*, at 29-30.

Barefoot v. *Estelle*, 463 U. S. 880, 894 (1983) established that "it is entirely appropriate that an appeal which is 'frivolous and entirely without merit' be dismissed after the hearing on a motion for a stay." Absent an unresolved factual issue, consideration of the petition by the District Court is no different.

In summary, there is an irreducible minimum below which a paper cannot be deemed a petition. It must be verified or signed under penalty of perjury. It must be signed by the petitioner absent extraordinary circumstances. It must serve the basic function of identifying the claims and their factual basis. In the next part, we will explain why Texas death row inmates can meet these requirements without prefiling stays.

IV. Practical alternatives exist.

Although fundamental principles of federal jurisdiction uniformly point to a lack of jurisdiction, petitioner attempts to justify prefiling stays with the dire prospect of a capital defendant being executed before his first federal petition could be filed. See Brief for Petitioner 35-36. There are two answers to this argument. First, jurisdictional questions do not require practical answers. Absent an exception to the Anti-Injunction Act, even an unmistakably clear interference with a protected federal right by a state court cannot be enjoined. *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U. S. 281, 294 (1970). Second, it is simply not true that prefiling stays are essential. With reasonable diligence on the part of a habeas petitioner and his attorney, this problem is readily avoidable.

Petitioner's interests can be protected more efficiently, and less drastically, by invoking 21 U. S. C. § 848(q)(4)(B) to appoint habeas counsel immediately after the prisoner's capital conviction is affirmed on direct appeal, if the state courts refuse to do so. Counsel can then spend the time between affirmance on direct appeal and denial of the prisoner's certiorari petition to prepare a habeas petition. This will provide both a legal and feasible solution to petitioner's worries.

The first advantage this proposal has over petitioner's claims is its legality. As petitioner recognizes, section 848(q)(4)(B) provides a federal court with the authority to

appoint counsel before a habeas petition is filed.[6] This person can be either the attorney appointed to prepare the certiorari petition or a different attorney, depending upon the needs of the case. See 21 U. S. C. § 848(q)(8). The attorney appointed under this statute will also have the necessary resources to investigate and prepare the habeas petition. See § 848(q)(4)(B).[7]

Most importantly, counsel will have the necessary time. As the present case demonstrates, the Texas Court of Criminal Appeals routinely stays executions while counsel prepares the certiorari petition. See Opp. 4. Once the certiorari petition is filed, the prisoner's sentence will be stayed by either the Court of Criminal Appeals or by this Court, see 28 U. S. C. § 2101(f). This Court will take a few months to rule on the petition. Furthermore, a capital inmate can, and in this case did, extend this time by filing for a petition for rehearing before the Court of Criminal Appeals. See, *e.g.*, Opp. 3. Added together, these stays will give counsel significant time to prepare a petition. In the present case, for example, over a year elapsed between the initial affirmance on direct appeal and denial of certiorari. See *ante*, at 2.

This is more than enough time to investigate and prepare a habeas petition. *Amicus* American Bar Association's survey found that the average amount of attorney time spent to prepare the certiorari petition was 65 hours, while another 305 hours were spent on the initial federal habeas petition. See ABA Brief 8, n. 23. Given the lavish provision for

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6. There is nothing novel about a plaintiff needing an attorney to represent him in a case before the legal proceeding is commenced. Civil plaintiffs hire attorneys for that purpose all the time.

7. Nor should there be any particular difficulty in recruiting counsel at this stage of the proceedings. Since payment is guaranteed by federal law, and there is no threat of imminent execution, it should be less difficult to recruit counsel at this stage than after certiorari is denied.

supplementary resources under section 848(q)(4)(B), there will be plenty of time to file an adequate petition.

Furthermore, the initial habeas petition need not be a work of art. It need not be prepared by the same attorney who will represent petitioner for the remainder of the proceedings. See 21 U. S. C. § 848(q)(8) (counsel appointed under section 848(q) can be replaced by "similarly qualified" counsel on motion of counsel or client). In light of the liberal provisions for amendment, it need not even contain every claim. See 28 U. S. C. § 2242; FRCP 15(a). What it must do is "state facts that point to 'a real possibility of constitutional error.' " Advisory Committee Note to Habeas Rule 4 (citation omitted).

There is, of course, some risk of duplicated effort if this Court grants certiorari. This risk, however, is minimal since only a handful of certiorari petitions are granted. Given the drastic solution offered by petitioner, it is a risk well worth running.

The practices that are alleged to have occurred in *Gosch* v. *Collins*, *affirmed* 8 F. 3d 20 (CA5 1993), see Brief for Petitioner 6-7, must not sidetrack this proposal. When an initial habeas petition alleging some constitutional violation is filed for the purpose of staying the execution while the case can be better developed, federal courts should not be allowed to sandbag petitioner by denying the petition before he has the opportunity to amend. While it is the duty of federal habeas courts to reject specious claims, they "should not, however, fail to give nonfrivolous claims of constitutional error the careful attention they deserve." *Barefoot* v. *Estelle*, 463 U. S. 880, 888 (1983). Petitioners like the one in *Gosch* should be given a fair chance to present their claims in their initial habeas proceeding. The practices affirmed in *Gosch* should therefore be formally disapproved.[8]

8. The disapproval should be limited to dismissals of first petitions. Successive petitions brought for the purpose of obtaining a stay are an entirely different matter, and should be summarily dismissed when it is apparent that no exceptions to the procedural default and successive petition rules exist.

The fact that counsel appointed under section 848(q)(4)(B) may find unexhausted claims will not threaten petitioner with loss of his stay. If the state courts are willing to stay the execution while the unexhausted claims are exhausted, there will be no threat to the prisoner. If, however, a state judiciary refuses to stay an execution so that claims may be exhausted, then there "is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner" and the exhaustion requirement will not apply. 28 U. S. C. § 2254(c); see *Duckworth* v. *Serrano*, 454 U. S. 1, 3 (1981); *Marino* v. *Ragen*, 332 U. S. 561, 564 (1947) (Rutledge, J., concurring). This will not, however, prevent the state from invoking procedural bar against procedurally defaulted claims that were never raised in state court. See *Engle* v. *Isaac*, 456 U. S. 107, 125-126, n. 28 (1982) (procedurally defaulted claims exempt from the exhaustion requirement).

This solution has the dual advantage of protecting the death row inmates' rights while reducing the delay that is the bane of capital punishment. At the very least it will start collateral attack litigation significantly earlier than under petitioner's proposals. As petitioner has no legitimate interest in invoking habeas corpus for the sole purpose of delaying his execution, this makes *amicus*' solution the superior alternative.

V. The Fifth Circuit's decision protects important interests.

Much of petitioner's case is based on the assumption that the result he favors will serve the greater good. On the other hand, Texas is portrayed as having no legitimate interest in having the Anti-Injunction Act enforced. Its

desire not to have its executions needlessly stayed by federal courts is derided as not being a "legitimate countervailing interest." See ABA Brief 28.

This view is wrong. Texas, and all other states with death row inmates, have a crucial interest in seeing that the Anti-Injunction Act is followed so that habeas corpus is not invoked as a tool for delaying constitutionally valid sentences. Affirming the court below will uphold these crucial interests without the dire consequences threatened by petitioner and his supporting *amici*.

The first interest protected by the decision below is the rule of law. It is a fundamental tenet of American jurisprudence that courts must decide cases on legal, not pragmatic principles. If the law mandates a particular result, then that result should be followed regardless of whether the result is good "policy." "[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963). The fact that a decision may do particular harm to a party or interest is no argument when the law is clear. "The argument of inconvenience has been pressed upon us with great earnestness. But where the law is clear, this argument can be of no avail . . . ." *Ex parte Kearney*, 7 Wheat. (20 U. S.) 38, 45 (1822).

There are also sound pragmatic reasons behind the Fifth Circuit's decision. One of the major problems federal habeas corpus raises in our capital punishment system is delay. "Reexamination of state convictions on federal habeas 'frustrate[s] . . . "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." ' " *McCleskey*, *supra*, 499 U. S., at 491, quoting *Murray* v. *Carrier*, 477 U. S. 478, 487 (1986) and *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982). So long as a death row prisoner is under the protection of a federal court, the state cannot render the punishment. "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; *but the power*

of a State to pass laws means little if the State cannot enforce them." *Ibid.* (emphasis added).

Allowing federal courts to stay executions before a habeas petition is filed will forge yet one more tool of delay from the Great Writ. Granting a stay before a petition is filed places the case in procedural limbo. While the stay is in effect, the state is prevented from executing its judgment, yet it has no ready means of opposition. Because no habeas petition has been filed, there is no action for the state to oppose. It can file no return, and does not even have the status of party. See *ante*, at 16.

The death row inmate has little reason to leave this limbo. Unless he has a particularly strong case for innocence, an extremely rare event, see *Herrera* v. *Collins*, 122 L. Ed. 2d 203, 233, 113 S. Ct. 853, 874 (1993) (O'Connor, J., concurring), he will do no better than get a new trial or sentencing hearing. Delay will help most successful habeas petitioners when they are retried or resentenced. "Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. While a habeas writ may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution." *Isaac*, *supra*, 456 U. S., at 127-128. If the prisoner has a weak case, then delay is his only ally. So long as he can get a court to stay his sentence he has "won." Thus it comes as no surprise that this Court is intimately familiar with the delaying tactics of some death row inmates. See, *e.g.*, *Woodard* v. *Hutchins*, 464 U. S. 377, 480 (1984) (Powell, J., concurring).

There are claims that prisoners will not use prefiling stays as a delaying tactic. Court supervision, some say, will ensure that the stay is not used as a tool of delay. See ACLU Brief 14. This is an unrealistic view. It is highly unlikely that judicial supervision will keep prefiling stays from becoming another tool of delay.

One problem with court supervision is that the incentives are skewed. At the very least, most death row inmates and

their counsel will have every reason to proceed with all deliberation possible. While counsel may not intentionally delay, the natural desire of attorneys to be as thoroughly prepared as possible and the benefits to the prisoner of delayed judgment can combine to make a compelling case for extreme deliberation.

On the other hand, the nature of the claims limits the enforcement tools available to the supervising court. Because of the extreme consequences, invoking the ultimate sanction of lifting the stay is very unlikely. Given the importance of including all claims in the first habeas petition, see *McCleskey*, *supra*, 499 U. S., at 494, there will be a natural inclination for many district courts to grant liberal extensions so that all claims may be thoroughly investigated. Because the court will be supervising the work of an attorney, the attorney-client privilege and the work product rule will limit close supervision of counsel's progress. See *Hickman* v. *Taylor*, 329 U. S. 495 (1947).

Furthermore, the supervising court has no particular interest in expediting prefiling investigation. Federal courts are notoriously overburdened. So long as a prisoner's case is in prefiling limbo it is one less case on an already overcrowded docket. Most federal courts, of course, would not want to unduly delay matters. Nonetheless, delay, whether inadvertent or willful, is a real risk in capital cases. See *In re Blodgett*, 116 L. Ed. 2d 699, 674-675, 112 S. Ct. 674, 676-677 (1992). Prefiling stays will create one more reason for delay.

Amicus ACLU asserts that federal habeas corpus is the chief defense against state judiciaries, which are supposedly incapable of protecting the constitutional rights of capital defendants. See ACLU Brief 23-24.

Neither proposition is true. Habeas corpus is not the most important means of reviewing convictions. "Direct review is the principal avenue for challenging a conviction . . . . 'The role of federal habeas proceedings, while important in assuring that constitutional rights are observed,

is secondary and limited.' " *Brecht* v. *Abrahamson*, 123 L. Ed. 2d 353, 370, 113 S. Ct. 1710, 1719 (1993), quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983) (emphasis added). This is entirely consistent with the trust this Court has in the state courts to follow the Constitution.[9] 123 L. Ed. 2d, at 372, 113 S. Ct., at 1721.

This case is not about making minor adjustments in the law to protect death row inmates from a parade of horrors. It is about upholding fundamental principles of federalism. Upholding these principles will not lead to any unreviewed executions, see *ante*, at 22-25, but will continue this Court's adherence to the rule of law.

VI. *Demosthenes* v. *Baal* accurately summarizes the controlling principles.

Demosthenes v. *Baal*, 495 U. S. 731 (1990) (*per curiam*) is a straightforward application of preexisting principles that constrained the District Court from formulating a rule that sanctions granting pre-petition stays.

Baal states that "federal courts are authorized by the federal habeas statute to interfere with the course of state proceedings only in specified circumstances." *Id.*, at 737. Although no citation is given, this is a statement of the fundamental principle established by the authorities in part II, *ante*. The Anti-Injunction Act bars federal interference absent an exception, and section 2251 is the only relevant exception.

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9. It is claimed that roughly 40 percent of state capital convictions are overturned in federal courts. See ACLU Brief 23-24. A study by *amicus* CJLF has shown that this grant rate is not due to the inability or unwillingness of state courts to follow the Constitution, but to other factors, primarily the complexity and instability of this Court's Eighth Amendment jurisprudence. See K. Scheidegger, Rethinking Habeas Corpus (1989), reprinted in Habeas Corpus Issues: Hearings Before the Subcomm. Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 1st Sess. 212 (1991).

"Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power. In this case, that basis was plainly lacking. The State is entitled to proceed without federal intervention." *Ibid.*

CONCLUSION

The decision of the Fifth Circuit should be affirmed.

February, 1994

Respectfully submitted,

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*

Attorneys for Amicus Curiae
Criminal Justice Legal Foundation

*Attorney of Record

AMICUS CURIAE

BRIEF

No. 93-6497

In The

Supreme Court of the United States

October Term, 1993

FRANK BASIL McFARLAND,

Petitioner,

v.

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE TARRANT, BEXAR, DALLAS, AND HARRIS COUNTY DISTRICT ATTORNEYS IN SUPPORT OF RESPONDENT

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, Texas 77002

STEVEN C. HILBIG
Criminal District Attorney
Bexar County, Texas
ED F. SHAUGHNESSY
Chief of the Appellate Section
300 Dolorosa, Suite 5072
San Antonio, Texas 78205

TIM CURRY
Criminal District Attorney
Tarrant County, Texas
BETTY MARSHALL
CHARLES M. MALLIN
EDWARD L. WILKINSON*,
401 W. Belknap
Fort Worth, Texas
76196-0201
(817) 884-1687

JOHN VANCE
Criminal District Attorney
Dallas County, Texas
133 N. Industrial Blvd.,
LB-19
Dallas, Texas 75207

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICUS CURIAE

The Tarrant County District Attorney is the local elected criminal district attorney for the County of Tarrant, Texas. *See* TEX. GOV'T CODE ANN. § 44.001 (Vernon Supp. 1994); TEX. GOV'T CODE ANN. § 44.320(a) (Vernon 1988). The Tarrant County District Attorney's Office prosecuted and obtained a conviction against Petitioner for capital murder, has defended the conviction on direct appeal in state court, and will represent the State in any subsequent habeas corpus action filed in state court. It thus has an immediate interest in the outcome of the present proceeding.

The Bexar, Dallas, and Harris County District Attorneys are the elected criminal district attorneys for Bexar, Dallas, and Harris counties, Texas. TEX. GOV'T CODE ANN. § 43.180(a), (b) (Vernon 1988); TEX. GOV'T CODE ANN. § 44.001 (Vernon Supp. 1994); TEX. GOV'T CODE ANN. §§ 44.115(a), 44.157(a)(Vernon 1988). Along with the Tarrant County District Attorney, these district attorneys prosecute over 50% of capital murder cases tried in Texas, and defend those convictions on direct appeal and in collateral attacks in both state and federal court. The Tarrant, Bexar, Dallas, and Harris County District Attorneys, then, have an interest in providing the Court with information necessary to a full understanding of the factual and procedural context in which capital cases are litigated in Texas. The Tarrant, Harris, Dallas, and San Antonio County District Attorneys have obtained the consent of both parties to file this brief, and will file the letters confirming their permission with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Tarrant County District Attorney submits this brief as *amicus curiae* because it agrees with Petitioner and his *amicus* counsel that the context surrounding the case is important to the proper resolution of the issue presented.

Petitioner and his *amicus curiae* counsel, relying largely upon "A Study of Representation In Capital Cases in Texas," by the Spangenberg Group, conclude that the capital habeas corpus "situation" in Texas "has passed 'the crisis level and requires immediate attention.' " [Petitioner's Brief at 3 (quoting Spangenberg Group, A Study of Representation in Capital Cases in Texas (March 1993), at ix)]. The "crisis" consists of the purported failure of a number of death row inmates to secure counsel in order to initiate habeas corpus actions. [Petitioner's Brief at 4-6]. Petitioner, and particularly his *amicus* counsel, imply that the inability of capital felons to secure counsel before filing a writ of habeas corpus justifies an interpretation of 21 U.S.C. § 848(q)(4)(B) and 28 U.S.C. § 2251 that would give federal district courts jurisdiction to grant stays of execution and appoint counsel absent the filing of an application for writ of habeas corpus. [Petitioner's Brief at 5-7, 15-18; Brief of the Texas Criminal Defense Lawyers Association at 14-18; Brief of the American Bar Association at 11-13; Brief of the American Civil Liberties Union at 6-7, 13-14].

But the basis of Petitioner's fundamental premise – that there exists a "crisis" of capital litigation – is highly questionable. The study upon which Petitioner and his *amicus curiae* rely is badly flawed and does not establish

Petitioner's presupposition. Similarly, several of the assumptions which underlie Petitioner's and his *amicus* counsels' contention – particularly their assertion that *pro bono* resources throughout the State are unavailable – are not borne out by the facts.

In light of Petitioner and his *amici's* failure to clearly establish their major premise that a "crisis" in capital litigation exists, the logical – and perhaps more important, the moral – force of their argument fails. *See McFarland v. Collins*, 8 F.3d 258, 259-60 (5th Cir. 1994) (Jones, J., dissenting). Petitioner's conclusion that federal courts should be vested with jurisdiction to interfere with state judgments simply on the basis that a "crisis" in representation exists is simply not warranted under the facts.

ARGUMENTS AND AUTHORITIES

Petitioner and his *amicus curiae* counsel, relying principally upon "A Study of Representation In Capital Cases in Texas," by the Spangenberg Group, repeatedly contend that Texas has "faced a looming crisis in the availability of counsel in capital habeas cases." [Brief of Texas Criminal Defense Lawyers Association at 3; Petitioner's Brief at 1-2; Brief of American Bar Association at 1-2]. Counsel further contends that heretofore death-row inmates have been able to secure counsel in spite of this "crisis." [Petitioner's Brief at 4-6; Brief of Texas Criminal Defense Lawyers Association at 3; Brief of the American Bar Association at 3-4].

Petitioner and his *amicus curiae* then maintain that the crush of recent capital convictions has rendered it impossible for condemned inmates to secure counsel and file writs of habeas corpus prior to petitioning federal district courts for a stay of execution and the appointment of counsel literally on the eve of execution. [Petitioner's Brief at 4-5; Brief of Texas Criminal Defense Lawyers Association at 14-16; Brief of the American Bar Association at 2-7]. This state of affairs, they assert, necessitates the conclusion that federal district courts have jurisdiction to enter a stay of execution and to appoint counsel, even though the federal habeas corpus statute, 28 U.S.C. § 2251, dictates that a stay may be issued only by a judge or justice "before whom a habeas corpus proceeding is pending." [Petitioner's Brief at 18-19; Brief of Texas Criminal Defense Lawyers Association at 16-18; Brief of the American Bar Association at 11-13].

Respondent has adequately addressed the issues surrounding the interpretation of 28 U.S.C. § 2251 and 21 U.S.C. § 848(q)(4)(B). *Amicus curiae* seeks instead to respond to Petitioner's contention that a "crisis" exists in capital representation that warrants extending the district courts' jurisdiction to granting stays of execution and appointment of counsel upon a capital felon's mere request.

Petitioner, of course, possesses no right to counsel in the post-conviction stage, *Murry v. Giarrantano*, 492 U.S. 1, 10 (1989), and he fails to assert, much less prove, that he has been denied a right of access to the courts outside the limits of *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

In addition, Petitioner has failed to prove the existence of this "crisis" to the district court by presenting any evidence whatsoever to support his contention. Furthermore, the district court has made no finding of fact regarding such a contention.

Finally, and perhaps most importantly, the studies upon which Petitioner and *amicus curiae* base their assertion are statistically suspect and do not take into consideration the full role that the Texas Resource Center plays in post-conviction death penalty proceedings throughout Texas. Petitioner has thus failed to establish a valid public policy ground to support his assertion that the district courts' jurisdiction should be expanded.

I. The Spangenberg Report Is Flawed, Unreliable, and Therefore Does not Establish the Contention that a "Crisis" in Capital Representation Exists.

Petitioner and his *amicus* counsel depend upon the Spangenberg Group's report, "A Study of Representation in Capital Cases in Texas" ("Spangenberg Report") to support their claim that Texas has reached a "crisis stage" in post-conviction capital felony representation. The study, however, appears seriously flawed in several basic ways, and its unreliability calls into doubt the validity of Petitioner's and his *amicus curiae's* assertion.

A. The report's sampling of data is unreliable.

The principle basis of the report is a survey which purports to quantify certain problems with capital representation in Texas. The report claims "an extensive mail

counsel – even to the point of drafting his motion for stay – while at the same time claiming that it was unable to find counsel to represent him. *Id.* at 8-9. The trial court readily condemned such tactics, terming it an attempt "to manipulate the orderly administration of justice" which brings "discredit and disrespect to our legal system." *Id.* at 9.

Similarly, in *Gosch v. Collins*, No. SA-93-CA-731, 1993 WL 484624 (W.D. Tex. Sept. 15, 1993), relied upon by Petitioner but unpublished by the district court, the Resource Center presented a manufactured "crisis" and asked for a stay of execution absent the filing of a writ of habeas corpus. In *Gosch*, shortly after the defendant's petition for writ of certiorari on direct appeal had been filed, he fired his retained counsel on the basis that his representation was being assumed by an attorney from the Center. *See* Robert S. Walt, Ending the Death Penalty Chaos, TEXAS LAWYER, December 6, 1993, at 20. One week later, the Center obtained the defendant's trial and appellate records from the Court of Criminal Appeals for copying. *Id.* Ten months later, on June 28, 1993, the defendant's petition for writ of certiorari to this Court was denied. *Id.*

On July 16, 1993, the trial court set the defendant's date of execution. *Id.* The Center protested, citing an inability to obtain counsel for the defendant, and asked for 120 days to recruit counsel and an additional 120 for counsel to prepare a petition. Robert S. Walt, Ending the Death Penalty Chaos, TEXAS LAWYER, December 6, 1993, at 20.

The trial court refused, but set the defendant's execution for almost three months away. *Id.* The Resource Center appeared in federal court three days prior to the scheduled execution, again claiming lack of counsel, but also filing a one-issue habeas petition. *Id.* The district court denied the petition and a stay of execution, even though the state did not oppose the stay. *Id. See also Gosch v. Collins*, No. SA-93-CA-731, 1993 WL 484624, at *2 (W.D. Tex. September 15, 1993).

The next day, the Center recruited an attorney for the defendant – the same attorney whom defendant had identified 15 months earlier as the attorney for the Center who had agreed to accept the case and who had recently left the Center for private practice. *See* Robert S. Walt, Ending the Death Penalty Chaos, TEXAS LAWYER, December 6, 1993. *See also McFarland v. Collins*, 8 F.3d at 259 n.3 (Jones, J., dissenting) ("the Resource Center has in several recent cases used exactly the same tactics – declining to file habeas petitions while trying, at the last minute, to press state and federal courts to grant stays under the pretext of unavailability of counsel," citing *Gosch*).

D. The Resource Center has been "intimately" involved in the present case.

In the present case the Center was "coordinating" Petitioner's case as early as January, 1993, well before mandate was issued by the Texas Court of Criminal Appeals. *See McFarland v. Collins*, 8 F.2d at 259 (Jones, J., dissenting); [Joint Appendix at 89]. On August 16, 1993 – more than two months after Petitioner's petition for writ

of certiorari had been denied, five months after the Court of Criminal Appeals' mandate, eight months after the Center has first acted on the case, and more than 13 months after the original affirmance by the Court of Criminal Appeals – the trial court set Petitioner's execution date for the following September 23, 1993. [Joint Appendix at 4, 89].

On September 19, 1993, the Resource Center sent a letter to the trial judge of the convicting court, Criminal District Court No. 3 of Tarrant County, Texas, in support of the Petitioner's "pro se motion for stay." [Joint Appendix at 6]. However, no such motion had been or was subsequently filed with the court. [Joint Appendix at 89]. The Center, claiming that it had been unable to recruit counsel for Petitioner, asked for 120 additional days in which to recruit counsel and for a further 120 days for counsel to file a petition. [Joint Appendix at 10].

The following day, September 20, 1993, a representative of the Resource Center, Lynn Lamberty, visited Petitioner at the Ellis I Unit of the Texas Department of Criminal Justice – Institutional Division in Huntsville, Texas. [Attorney Application to Visit TDCJ Inmate,[4] Appendix "C"]. Almost simultaneously, two other representatives of the Resource Center telephoned the attorney for the State handling Petitioner's case, and that attorney's two immediate supervisors, to discuss the possibility of the State agreeing to a stay of execution in the case. [Joint Appendix at 91, 94, 96]. The State outlined its

[4] This exhibit was presented to the district court without objection, but has not been included in the Joint Appendix.

position – the trial court had no jurisdiction to grant a stay absent the filing of a petition for writ of habeas corpus, but the State would agree to a stay if a petition were filed – but the attorneys for the Center disagreed. [Joint Appendix at 91, 94, 96].

That afternoon, two different representatives of the Resource Center appeared before the judge of Criminal District No. 4 of Tarrant County. [Joint Appendix at 92]. Since the judge of the convicting court was unavailable, the Resource Center asked that the judge of Criminal District Court No. 4 stay Petitioner's execution in his stead. [Joint Appendix at 92]. The judge refused, but did postpone the execution 34 days to October 27, 1993. [Joint Appendix at 12, 18].

On October 13 or 14, 1993, yet another representative of the Resource Center again contacted the Tarrant County District Attorney's Office and asked if the State had altered its position in regard to the filing of a petition for writ of habeas corpus as a perquisite to jurisdiction in the trial court. [Joint Appendix at 92]. The State reiterated its position, and the matter was not further pursued at that time.

On October 16, 1993, the Resource Center again sent a letter to the trial judge, urging him to stay Petitioner's execution and give the Center 120 days to secure *pro bono* counsel and an additional 120 days for counsel to file a petition. [Joint Appendix at 16]. Three days later, on October 19, 1993, Petitioner was again visited in prison by a representative of the Resource Center. [Attorney Application to Visit TDCJ Inmate, Appendix "B"].

On October 21, 1993, Petitioner filed a "pro se" motion for stay directly in the Court of Criminal Appeals. [Joint Appendix at 21]. The motion had obviously been prepared by the Resource Center, since a Center attorney signed the certificate of service. [Joint Appendix at 23]. Accompanying Petitioner's motion was a letter from the Resource Center asking for 120 days in which to recruit counsel and a further 120 days for counsel to file a petition. [Joint Appendix at 24]. Petitioner, in his motion, specifically asked the court "to give the Center the time [the Center's attorney] requests in the letter to recruit a lawyer for me." [Joint Appendix at 22]. The Court of Criminal Appeals denied the motion the following day. [Joint Appendix at 40]. Petitioner filed a petition for writ of certiorari with this Court seeking review of this decision, which was subsequently denied. *McFarland v. Texas*, ___ U.S. ___, 114 S.Ct. 575 (1993).

Petitioner filed a "pro se" Motion for Stay of Execution and Appointment of Counsel in federal district court on October 26, 1993. *McFarland v. Collins*, 8 F.3d at 258 (Jones, J., dissenting); *McFarland v. Collins*, 7 F.3d 47, 48-49 (5th Cir. 1993) (per curiam); [Joint Appendix at 41]. The motion obviously had been prepared by the Resource Center, since an attorney for the Center signed the certificate of service, the motion was accompanied by a cover letter from the Resource Center dated October 22, 1993, and the motion contained copies of orders from six other cases in which stay had been granted. [Joint Appendix at 45-46]. Petitioner did not file a petition for writ of habeas corpus. *McFarland v. Collins*, 8 F.3d at 258 (Jones, J., dissenting); *McFarland v. Collins*, 7 F.3d at 48; [Joint Appendix at 76].

The district court denied Petitioner's motion, [Joint Appendix at 76], and his request for a certificate of probable cause to appeal. *McFarland v. Collins*, 7 F.3d at 48-49; Joint Appendix at 79. Represented in the Fifth Circuit by Mandy Welch, who designated herself "temporary counsel," Petitioner filed an "Application for Certificate of Probable Cause and Motion for stay of execution." [Joint Appendix at 81]. The Fifth Circuit, noting in passing that Petitioner's appeal had been prepared by the Resource Center, denied his application for certificate of probable cause and motion for stay of execution. *McFarland v. Collins*, 7 F.3d at 49; [Joint Appendix at 86].

Upon the Fifth Circuit's denial of his application for certificate of probable cause and motion for stay of execution, Petitioner sought a writ of certiorari to this Court. The petition, signed by attorneys for the Center, stretched 26 pages, and was obviously prepared by the Center. Petitioner additionally filed a 6 page supplement and a 17 page reply brief, both prepared by the Center.

At the same time that Petitioner filed a petition for writ of certiorari in this Court, he also filed a petition for writ of habeas corpus in federal district court. *See McFarland v. Collins*, 8 F.3d at 258 (Jones, J., dissenting). The application had been prepared by the Center the day before. *Id.* at 259. The district court denied relief. *Id.* Petitioner appealed to the Fifth Circuit, where Respondent waived the requirement of exhaustion as to the single issue raised by Petitioner, and the Fifth Circuit granted a stay of execution. *McFarland v. Collins*, 8 F.2d at 258. Petitioner subsequently dismissed his petition. *McFarland v. Collins*, 8 F.3d 256, 257 (5th Cir. 1994).

The Resource Center, then, has been "intimately" involved in Petitioner's case since before his direct appeal to state court became final. *See McFarland v. Collins*, 8 F.3d at 260 n.4 (Jones, J., dissenting). It has had numerous contacts with him both in person and through correspondence, it has prepared every motion and entreaty submitted to five different courts, it has had at least six different attorneys do some work on the case, and had five attorneys on the case on the same day. As Judge Jones has concluded, "this case became a manufactured procedural emergency long before it reached federal court," and there has been "no legitimate basis for the brinkmanship that has occurred here." *McFarland v. Collins*, 8 F.3d at 259 (Jones, J., dissenting). It is not a "crisis of representation" that threatens to disrupt the orderly progress of Petitioner's capital conviction, but a blatant manipulation of the courts by the Resource Center for the purpose of making it appear that a "crisis" exists.

E. Conclusion: the Resource Center, as it has in other, similar cases, has actively represented Petitioner while at the same time claiming that he did not have counsel.

The "well-staffed" Resource Center, then, has not been prevented either by its express charter nor by its available financial resources from representing Petitioner or other "unrepresented" capital felons. *See McFarland v. Collins*, 8 F.2d at 259 n.3 (Jones, J., dissenting). *See also* Jones, *supra*, at 851 (In five years on the [federal] bench . . . I have never seen a defendant suffer from lack of legal counsel, nor have I known any defendant to be executed without benefit of representation of counsel").

The Center has in the past declined to file writs of habeas corpus on behalf of an inmate while at the same time pressing state and federal courts to grant stays of execution on the pretext that the inmate has no legal counsel. In the present case, the Center's intimate involvement in all phases of the case belies its contention that Petitioner is unrepresented and that the "crisis" of death-row representation prevents it from working on behalf of capital felons for whom it could not recruit counsel.

III Conclusion: Petitioner's Claim That a "Crisis" Exists in Capital Habeas Litigation Is Not Borne Out By the Spangenberg Report nor the Facts of This Case.

Petitioner's assertion that a current "crisis" exists in Texas post-conviction capital litigation fails to take into account the "intimate" involvement of the "well-staffed" and well-financed Resource Center. The claim also relies upon a survey that is, at best, unreliable and which does not support the the broad conclusions it contains. Petitioner has thus failed to establish that a "crisis" exists at

all. His arguments based upon this premise, both logical and moral, are therefore unsupported.

Respectfully submitted,

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, Texas 77002

STEVEN C. HILBIG
Criminal District Attorney
Bexar County, Texas
ED F. SHAUGHNESSY
Chief of the Appellate Section
300 Dolorosa, Suite 5072
San Antonio, Texas 78205

TIM CURRY
Criminal District Attorney
Tarrant County, Texas
BETTY MARSHALL
CHARLES M. MALLIN
EDWARD L. WILKINSON*,
401 W. Belknap
Fort Worth, Texas
76196-0201
(817) 884-1687

JOHN VANCE
Criminal District Attorney
Dallas County, Texas
133 N. Industrial Blvd.,
LB-19
Dallas, Texas 75207

* Counsel of Record

APPENDIX A

IOLTA (INTEREST ON LAWYERS' TRUST ACCOUNTS) GRANT APPLICATION

PART I – Preliminary Request for Funding

Please complete this Preliminary Request for Funding and return it to the Texas Equal Access to Justice Foundation by February 5, 1993. With the form you should furnish 1) a copy of your organization's Internal Revenue Service 501 (c) (3) determination letter, 2) the counties served form, 3) any funding source monitoring report (except IOLTA's) within the last two years (if applicable), 4) a list of the members of your organization's governing body, identifying lawyer members, client members and representative of another organization, and 5) a one page narrative describing the type of project involved, legal issues to be addressed, organizational structure, and other funding sources. (Current grantees who have previously submitted this documentation need not re-submit it if you have checked your records to be sure there have been no material changes made to the documents since you submitted them.)

Program Name: Texas Appellate Practice & Educational Resource Center

Name of Applying Organization (if different): _____

_____

Address: 1206 San Antonio Street

Austin TX 78701

Telephone: 512/320-8300

Program Director: Eden E. Harrington, Executive Director

Grant Application Preparer: Eden E. Harrington

Chairperson of Board of Directors or Trustees: Michael Tigar, Esq.

Tax Identification No. 74-2496934

Amount of IOLTA Grant Request: $150,000

Category (Select one): X Discretionary ___ Poverty Population

Proposed Use of Requested Funds: Recruiting, Training & Litigation of capital habeas corpus appeals

Faxed applications will not be accepted.

[LOGO]

Texas Equal Access to Justice Foundation

Mailing Address	Office Address
P.O. Box 12886	400 West 15th Street,
Austin, Texas 78711	Suite 712
	Austin, Texas 78701

512-463-1444 or 800-252-3401

[1] **Part II: Applicant Description & Request for Funding**

Your complete grant application should include the following:

1. This form (Part II: Applicant Description & Request for Funding) and
2. All materials listed on the Checklist of Enclosures on page 2.

- Submit the original plus two copies of item 1.
- Submit only one copy of item 2 (enclosures).
- See "How to Apply" in the cover materials accompanying these application forms for further instructions and for a timetable for the funding process.

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A. General Program Information

___ A. New Application for Funding

xx B. Previous Grantee

1. **Organization Name:** Texas Appellate Practice & Educational Resource Center
2. Street Address: 1206 San Antonio
   Austin TX 78701
   Mailing Address: ___
   ___
3. **Telephone No.** 512/320-8300 **Fax** No. 512/477-2153
4. **Cities where branch offices are located:** Houston, San Antonio

B. Signatures

Program Director:

Eden Harrington,
Executive Director

Print or type name

X _____
/s/ Signature of Program Director

Chairperson of Governing Board:

Michael Tigar
Print or type name

X /s/ Michael E. Tigar
/s/ Signature of Chairperson of Governing Board

U.T. Law School, 727 E. 26th St., Austin TX 78705
Business address

512/471-5151
Phone number

Contact Person:

Eden Harrington

[2] *C. Grant Request*
Applicants Please Note:

Complete ONE Part II for each grant you are requesting. Photocopy additional forms if required.

Check ONE only:

__ **Low Income Population Grant Request Amount:** $_____

xx **Discretionary Grant Request Amount:** $150,000.00

Name of Proposed Project Texas Appellate Practice & Educational Resource Center

D. Checklist of Enclosures

Number and enclose the following supplemental materials with this Grant Application. (Current grantee who have previously submitted this documentation need not re-submit it if you have checked your record to be sure there have been no material changes made to the documents since you submitted them.)

Previously Submitted		Enclosed	Attachment No
xx	Description of your organizations Affirmative Action/ EEO policy	__	_____
xx	Client Financial Eligibility Guidelines	__	_____
xx	Description of your organization's professional liability coverage	__	_____

[3] *E. Description of the Applicant Organization*

1. Overall Purpose

Provide an overview of the client and/or community needs your organization currently addressed.

The purpose of the Texas Resource Center is to ensure that all indigent death row inmates in Texas have access to competent legal representation for their post-conviction state and federal appeals. Without the Center, many death row inmates would have no legal counsel and no opportunity to attack the validity of their conviction and sentence through the constitutionally-provided appeals process. Texas has the largest death row population in the country, has executed more persons than any other state, and is the only state with a large death row that does not provide counsel to indigent inmates.

2. *Overview of Services and Activities*

List the nature of the services provided by your organization with special emphasis on legal services for low-income people and related activities. Be sure to complete Attachment A (1), General Case Services, and A (2), Annual Case Summary Report.

When the conviction and sentence of a death row inmate is affirmed on direct appeal, the Center determines whether the inmate's appellate counsel will continue representing him or her. If the inmate is left without an attorney, the Center begins efforts to recruit *pro bono* counsel to take over the case. Our legal staff provides comprehensive litigation support to *pro bono* counsel through case-specific consultation, training, manuals, investigative services, sample pleadings, and assistance with pleadings and court appearances. The Center's attorneys also represent a limited number of death row inmates directly.

3. *History of Organization*

Give the origin of your organization including length of service to the community.

In 1987, representatives of the state and federal judiciaries and the State Bar met to address the critical need for representation for death row inmates in Texas. The resulting plan depended upon the participation of private attorneys and law firms in this representation on a *pro bono* basis. The plan also required the establishment of a resource center to provide those attorneys and firms with substantive assistance and expert guidance in the complex area of capital habeas corpus law. The University of

Texas Capital Punishment Clinic was designated as the *ad hoc* resource center until, with the overwhelming endorsement of the federal judiciary in Texas, federal funding through the Criminal Justice Act was obtained and the present Texas Resource Center began operation in October 1988.

4. *Track Record*

Highlight your organization's most significant achievements during the calendar year ending December 31, 1992. Examples might include:

- *"Our organization handled 500 immigration cases."*
- *"Our three lawyers served 600 clients."*

During 1992 the Center's caseload increased significantly. At the beginning of the year Center attorneys were providing substantial assistance to counsel in 103 cases, and were representing 37 clients directly. At the year's end, the Center's legal staff was providing comprehensive support in 168 cases and were directly representing 21 clients. During the year the Center worked with the State Bar and local bar associations to recruit counsel for approximately 15 habeas corpus cases and more than 20 petitions for writ of certiorari to the United States Supreme Court. Center attorneys worked particularly hard providing hands-on assistance to pro bono counsel during the crisis litigation surrounding the 111 execution dates scheduled during 1992.

[4] 5. *Staff composition*

Using the form provided, indicate the number of Full-Time Equivalents (FTEs) within the legal services component of

your organization as of December 31, 1992. A full-time equivalent is one person working full-time – For example, two persons, each working half-time, amount to 1.0 FTE. FTE figures can be expressed in decimals – for example, 1.5 lawyers.

	Staff-in Full-Time Equivalents (FTE) Paid Staff				
	Full Time	Part Time Number	FTE	Tempo-rary	Volun-teer
1. Number of Lawyers	15				
2. Number of Paralegals & Investigators	2				
3. Number of Other Staff	7	5	3.25		
4. Total	24	5	3.25		

6. *Service Priorities*

Describe your current service priorities and provide the date they were established or last reviewed.

Recruitment of *pro bono* counsel to represent death row inmates in their post-conviction appeals is one of the Center's immediate goals. There [sic] presently a critical backlog of inmates without counsel. The main service priority of the Center is to provide comprehensive assistance and training to the attorneys and law firms that have taken on capital habeas corpus cases. And additional priority is to provide quality direct representation to a limited number of inmates. These priorities were established in 1988 with the creation of the Texas

Resource Center, and are reviewed annually by the Center's staff and Board of Directors.

7. *Community Outreach and Public Information Activities*

Describe the means by which the majority of potential clients learn about the availability of your organization's services.

The Center's client population is limited to two locations in Texas: the Ellis Units of T.D.C.J. in Huntsville, where male death row inmates are incarcerated; and the Mountain View Unit in Gatesville, where the (current four) women on death row are held. The Center's existence and purpose is widely known within these prison units. In addition, Center attorneys contact all potential clients after their cases have been affirmed by the Court of Criminal Appeals if their appellate attorney indicates that he or she will no longer represent them.

[5] 8. *Expenditures on Legal Services for the Poor and Related Activities*

*Provide a breakdown of your organization's total actual expenditures on legal services and related activities for the calendar year ending December 31, 1992, **regardless of funding source.***

Categorize expenditures using the Explanation of Categories, Attachment B.

If your organization's fiscal year is different, pro-rate expenditures to cover the calendar year indicated.

Cost Category	Total Expenditures, Calendar Year 1992
PERSONNEL:	
Lawyers	6[illegible]5,318.73
*Paralegals includes in-kind for students and interns	254,055.50
Others	321,908.81
Subtotal	1,212,283.04
Employee Benefits	234,765.53
Total Personnel	1,447,048.57
NON-PERSONNEL:	
Space	157,794.61
Equipment rental	61,117.96
Supplies	53,349.71
Telephone	126,764.81
Travel	310,844.12
Training	10,911.30
Library	2,853.44
insurance	5,528.12
Audit	10,379.00
Litigation	311,630.67
Capital additions	233,122.35
Contract services	
Other	54,109.16
Total Non-Personnel	1,338,405.25
Total Expenditures	2,785,453.82

Litigation: Experts
copying & repro

Other: Postage
Bank Fees
Recruiting
Miscellaneous

[page break] *F. Funding Proposal*

1. Statement of the Problem to be Addressed

Describe the client or community needs to be addressed, and state the extent to which these needs are not currently being met.

If the Texas Resource Center did not exist, indigent inmates would be facing execution without having had an opportunity to attack the validity of their conviction and sentence through the appellate process. Texas currently does not provide an indigent death row inmate with an attorney for their constitutionally available habeas corpus appeals, and most inmates do not have counsel to pursue their post-conviction appeals. The Center is the one organization in Texas working to ensure that indigent death row inmates have competent legal counsel. On an ongoing basis, the Center expends significant effort in cooperation with the State Bar and local bar association to recruit *pro bono* counsel for these inmates. More than 85 inmates are presently represented by attorneys recruited through the Center, but 37 inmates currently are without legal counsel. The Center provides substantial continuing assistance and support to the attorneys and law firms representing 168 inmates, and represents approximately 21 individuals directly – out of about 215 post-conviction inmates. The Center's caseload will continue to grow as additional attorneys are recruited to represent the backlog of inmates without counsel. The critical need for the Center's services will increase during the next year as the size of death row continues to expand, the number of inmates without legal

counsel grows, and the recruitment of *pro bono* attorneys and firms becomes ever more difficult.

---

2. *Proposed Strategies for Addressing the Problem*

Provide an overview of the planned legal services or other activities that will be used to address the needs identified in "1" above.

A primary strategy of the Center will be to focus on recruiting *pro bono* counsel for indigent death row inmates. The Center will continue to work closely with the State Bar, local bar associations, and members of the state and federal judiciaries to plan new recruitment efforts to try to address the present crisis in lack of counsel. Capital habeas corpus litigation is complex and expensive, and it will remain difficult to recruit attorneys for these cases. The main work of the Center will continue to be providing significant litigation support to *pro bono* counsel through formal training sessions, case-specific consultation, sample pleadings, investigative service assistance with pleadings and court appearances, updated manuals, etc. Center attorneys will also maintain a direct representation caseload of 30 to 40 inmates.

---

3. *Uses for the Requested Funds*

Describe the specific purposes for which the requested funds will be used – for example, hiring specific categories of staff, purchasing specific resources, etc.

IOLTA funding is critical to the existence of the Texas Resource Center. The funds are used to support all aspects of the Center's work (including staff salaries, litigation expenses, production of training material, office

maintenance, etc.) in connection with the state habeas corpus stage litigation. It is not possible to present constitutional claims to the federal courts without first developing and presenting them in the state courts. In order for the Center to receive potentially available federal funds (through the Administrative Office of the U.S. Courts) to support development of constitutional claims and their presentation in federal courts, the Center must raise 20% of its budget from non-federal sources to support the state habeas portion of its work. Without generous funding from the Texas Equal Access to Justice foundation, the Center's entire funding and existence is [in] jeopardy.

[8] 4. *Other Resources that Will Be Employed*

List any resources in addition to this grant that will be used in carrying out the strategies described in "2", page 7, including other funding, donated space, volunteer help, etc.

Eighty percent of the Center's overall budget can potentially be obtained through the Administrative Office of the U.S. Courts if the Center can meet the 20% matching funding requirement. The Center currently receives funds from the Texas Bar Foundation and St. Mary's College of Law, and utilizes generous in-kind support from St. Mary's, the University of Texas Law School, and South Texas College of Law. The Center expects to receive continuing support from those organizations, and is seeking additional funding from the Public Welfare Foundation and other sources.

5. *Cooperative Efforts*

a. **List the organizations that will actively participate.**
See Below

b. **Describe cooperative efforts, if any,**

The Center works closely with a number of organizations in trying to ensure that all death row inmates have competent legal representation. The Center works on an ongoing basis with the State Bar, local bar associations and members of the state and federal judiciaries in *pro bono* recruitment efforts. The Center, [sic] In addition, we are involved with several committees of the State Bar, local bar associations, the American Bar Association, University of Texas Law School, St. Mary's College of Law, South Texas College of Law, the Texas Criminal Defense Lawyer's Association, and the National Legal Aid and Defender Association. All of these organizations will continue to support the Resource Center in our efforts to recruit *pro bono* counsel and provide training and assistance to them.

6. *Target Populations*

Check only ONE of boxes 1, 2, 3, or 4 at the right.

- *Check boxes 1-3 if your proposal will provide direct legal services to low-income clients.*
- *Check box 4 if your proposal is primarily aimed at a different audience – for example, training other legal service providers.*

__ 1. General low-income population; no specific client groups targeted.

xx 2. One Low-income client group
If this box is checked, also check below the ONE specific group targeted by your services.

__ a. The elderly
__ b. Children and/or youth
__ c. Women
__ d. People with disabilities
__ e. Inmates
__ f. Immigrants (including refugees)
__ g. Migrant workers
__ h. Homeless persons
__ i. Persons with AIDS
xx j. One distinct population other than above-specify:
Texas death row inmates

__ 3. A combination of low-income groups (a) through (j) above

List all groups targeted: _____

__ 4. Other – specify: _____

[9] 7. ***Legal Problem Types Targeted***

Check only ONE box (1,2,3, or 4) at right.

Check "Not Applicable" if your proposed project is not aimed at providing direct legal representation for low-income people.

__ 1. **Full range of legal problem types**

__ 2. **Particular Problems.** If this box is checked, check below all of (a) through (g) that are specifically targeted:

__ a. Domestic violence

__ b. Public benefits

__ c. Housing/homelessness issues

__ d. Immigration

__ e. Employment

__ f. Disability

__ g. Health

xx 3. **Other Problems – specify:**
Constitutionality of conviction and death sentence

__ 4. **Not applicable – specify reasons:**

_____

_____

8. *Size of Eligible Population*

Estimate the total number of people eligible for the specific services proposed in this funding request, include in your estimated numbers only those persons who:

- *Fit within your proposed target population per item 6, page 8,*
- *Qualify as one of the legal problem types this program will address per item 7, above,*
- *Are within your geographic service area per Counties Served Form submitted with Part 1,*
- *Qualify for services under your program's financial eligibility guidelines.*

a. *Estimated number of people eligible for your services.*

xx (1) Less than 1,000

__ (2) Between 1,000 and 5,000

__ (3) Between 5,000 and 10,000

__ (4) Between 10,000 and 25,000

__ (5) Between 25,000 and 50,000

__ (6) Between 50,000 and 100,000

__ (7) More than 100,000 –

Specify approximate number: _____

b. Source and reliability of your estimate – indicate below your data source and an explanation of the reasons why you think the estimates are reliable.

There are currently 367 persons on death row in the state of Texas.

[10] ***G. Proposed Budget For 1993-94 Grant Year***

1. Budget Breakdown

Summarize the total budget for carrying out the strategies described in "F.2". Examples of "b. Anticipated Non-IOLTA Expenditures" include other grants, bar associations funds, etc.

Categorize expenditures using the Explanation of Categories. Attachment B.

Note: Computer users may provide this information in an attached spreadsheet printout that has the same row and column labels as this form.

Cost Category	a. Anticipated IOLTA Expenditures	b. Anticipated Non-IOLTA Expenditures	c. Total Expenditures
PERSONNEL:			
Lawyers	59,388	1,353,043	1,412,431
Paralegals	14,440	320,115	334,555
Others	10,322	203,100	213,422
Subtotal	84,150	1,876,258	1,960,408
Employee Benefits	26,950	204,900	231,850
Total Personnel	111,100	2,081,158	2,192,258
NON-PERSONNEL:			
Space	4,315	236,310	240,625
Equipment rental	4,210	76,879	81,089
Supplies	4,568	123,645	128,213
Telephone	3,280	148,965	152,245
Travel	6,352	398,695	405,047
Training	1,568	60,395	61,963
Library	2,172	87,770	89,942
Insurance	0	14,491	14,491
Audit	300	13,055	13,355
Litigation	7,560	482,780	490,340
Capital additions	0	155,294	155,294
Contract services	0	0	0
Other	4,575	33,063	87,638
Total Non-Personnel	18,900	1,881,342	1,920,242
TOTAL	150,000	3,962,500	4,112,500

[11] **2. *Anticipated Sources of Non-IOLTA Funding***

Provide a breakdown, by source, of the total anticipated Non-IOLTA funding shown in column "b" on page 10.

Source	Amount
a. Foundations (other than IOLTA)	$
b. Filing fees	$
c. United Way	$
d. Legal Services Corporation (LSC)	$
e. City & county funding	$
f. Church funding	$
g. Title III – Administration on Aging	$
h. Law schools	$ 25,000
i. Attorney fees	$
j. Bar Associations	$
k. Title XX – Health & Human Services	$
l. Other A.O. & In-Kind 3,150,000 787,500	$ 3,937,500
*TOTAL	$ 3,962,500

***Note:** This Total should equal the total shown in Column "D" in the budget on page 10.*

3. *Increases or Reductions In Sources of Non-IOLTA Funding*

Report anticipated increases or reductions in funding from sources other than IOLTA and give an explanation for the increase or reduction.

The Center expects to receive increased federal funding from the Administrative Office of the U.S. Courts, due to an increase in the Center's federal habeas corpus caseload. Again, the Center can only receive the potentially available federal funds if 20% matching funding is obtained from non-federal sources. The Center expects support from its other non-federal funding sources to remain at present levels.

[Attachment A(1)] General Case Services

Attention Applicants: This section must be completed if your program provides "case services," that is, provides direct legal representation such as counsel and advice, assistance in preparing legal documents, representation in court or administrative proceedings, etc.

Count ALL case services provided by your program, not just the IOLTA-funded services.

If your program does NOT provide case services, check the box below and do not complete the remaining form or attachment A(2).

__ Not Applicable – We do not provide case services.

Background Information About Case Statistics

The information in this section is important to the Foundation in understanding fully the work you are doing and in describing to others the IOLTA program's impacts.

1. *Definition of "Case" Used for Statistical Reporting Purposes*

The Foundation requires all grantees to use a uniform definition of "case" (see "a" at right) for statistical reporting purposes, unless special circumstances warrant an exception. If your program used a different definition for compiling the statistics on the annual case summary report, check box "b" at right and give your definition.

Check ONE only:

__ a. We use the Foundation's definition of a "case", which is as follows:

A "case" is a distinct legal problem or a set of closely related legal problems of a client, and legal activities or processes used in resolving those problems. A case includes brief services, such as advice, as well as other types of legal representation. A client with two or more closely related problems will be considered as presenting a single case if all of the problems will be resolved through a single legal process or forum.

xx b. We use a different definition, which is as follows:

An individual client represents a case.

[Attachment A(2)] ANNUAL CASE SUMMARY REPORT

To be completed for the 1992 calendar year (January 1, 1992 – December 31, 1992)

Name of Applicant: Texas Appellate Practice & Educational Resource Center

Male	Female	Total
202	4	206

CLIENT PROFILE	Under 16	18-59	60 and Over	Total
White-Not of Hispanic Origin		90		90
Black-Note of Hispanic Orignin [sic]		84		84
Hispanic		30		30
Native American				
Asian or Pacific Islander		2		2
TOTAL		206		206

Disabled **more than 75% of death row inmates are mentally or emotionally disabled.

APPENDIX B

ATTORNEY APPLICATION TO VISIT TDCJ INMATE

Ellis I
(Institution)

I, Lynn Lamberty, a licensed attorney in the State of Texas, with offices at 3223 Smith St., Suite 215 Houston visiting Frank McFarland #963, on Oct 19, 1993, affirm that my visit with this inmate is for the purpose of assisting me in matters related to the attorney-client or attorney-witness relationship and for no other purpose. I agree that any tape recording made by me will be used only to assist this relationship.

/s/ Lynn B. Lamberty
(Signature)

11847050
(State Bar No.)

1-163 (Rev. 11/90)

ATTORNEY APPLICATION TO VISIT TDCJ INMATE

Ellis I
(Institution)

I, Lynn Lamberty, a licensed attorney in the State of Texas, with offices at 3223 Smith St., Suite 215 Houston visiting Frank McFarland, on 9-20, 1993, affirm that my visit with this inmate is for the purpose of assisting me in matters related to the attorney-client or attorney-witness relationship and for no other purpose. I agree that any

tape recording made by me will be used only to assist this relationship.

/s/ Lynn B. Lamberty
(Signature)

11847050
(State Bar No.)

1-163 (Rev. 11/90)